



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Omni Analysis - Claim for Bid Protest Costs

File: B-233372.4

Date: May 1, 1990

Gail Kezer Lowe, Esq., Kutak Rock & Campbell, for the protester.
Eloisa Regalado, Esq., Naval Supply Systems Command, Department of the Navy, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's general objections to the allegedly "excessive" number of hours claimed by the protester as spent by its attorneys and employees in pursuit of its protest provide an insufficient basis for concluding that the attendant costs are not reasonable where the hours are properly documented and certified.
2. Claim for bid protest costs incurred for working on a companion protest and in pursuit of a cost claim, and for contacting a congressional representative, are disallowed since they are unrelated to the pursuit of the protest.
3. Claim for profits on protester's labor costs is disallowed since there is no statutory basis to award profits as part of the costs for pursuing a bid protest.
4. Claim for a general and administrative expense factor to be applied to protester's direct expenses is disallowed in the absence of a sufficient explanation of the basis for that factor.

DECISION

Omni Analysis requests that our Office determine the amount it is entitled to recover from the Department of the Navy for the costs of filing and pursuing its protest in Omni Analysis, 68 Comp. Gen. 300 (1989), 89-1 CPD ¶ 239, aff'd Omni Analysis; Department of Navy--Requests for Recon., 68 Comp. Gen. 559 (1989), 89-2 CPD ¶ 73. We determine, as

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discussed below, that Omni is entitled to recover \$66,956.40 as the costs of filing and pursuing its protest.

Omni filed its original protest on October 27, 1988, against the award of a contract to Advanced Technology, Inc. (ATI), for training support services. On March 6, 1989, we sustained that protest on the basis that ATI had misrepresented the availability of its personnel in its best and final offer and had, thereby, compromised the integrity of the procurement process. We recommended that the Navy not exercise the options under the contract. Both the Navy and Omni filed requests for reconsideration. The Navy's request for reconsideration alleged that Omni had not been prejudiced by ATI's actions, and otherwise challenged the recommended remedies including the award of protest costs. Omni's request sought termination of basic contract and recompetition. On July 24, 1989, we affirmed our previous decision.

The protester claims a total of \$73,174.40, consisting of \$35,210.40 in attorneys' fees and \$37,964 for time charged to company personnel in pursuing the protest, as well as for certain company expenses. Because the parties have been unable to reach an agreement concerning the amount to which Omni is entitled, we have been requested to make that determination pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1989).

ATTORNEYS' FEES

Of the total amount claimed, Omni requests reimbursement for \$35,210.40 for 339.25 hours of attorneys' time plus related expenses. The hours claimed are primarily for the work of two principal attorneys and their support staff, as well as for certain word processing and proofreading services. Omni's attorneys have certified that the hours billed were actually spent on filing and pursuing the protest and that the hourly rates are those customary for the law firm. The Navy does not challenge the reasonableness of the rates. Rather, the agency challenges the number of hours billed as excessive, especially in light of the allegedly "simple" nature of the protest and the fact that Omni only prevailed on one of the issues raised in its protest. The Navy criticizes the bill as excessive for such matters as an alleged overexpenditure of time on basic research, too many trips to law libraries, too many telephone conferences with the client, and oversupervision of the lead attorney. The agency also questions certain expenditures as not directly related to the protest and argues that the protester should not be reimbursed for costs pertaining to issues raised but not sustained. In addition, the Navy asserts that Omni is

not entitled to be reimbursed for costs incurred after it received the initial March 6 decision.

We generally accept the number of attorney hours claimed, if properly documented, unless specific hours deemed to be excessive can be identified and a reasonable analysis for their rejection articulated. Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401. Simply concluding that the hours are excessive is inadequate, and generalized characterizations of a protest as being "simple" are not probative evidence that the number of attorney hours claimed is excessive. See Data Based Decisions, Inc.--Claim for Costs, B-232663, Dec. 11, 1989, 89-2 CPD ¶ 538. Moreover, contrary to the Navy's continuing argument, we specifically indicated in our reconsideration decision that Omni's entitlement to protest costs was not limited solely to those incurred in relation to the one issue upon which it prevailed. Omni Analysis et al.--Request for Recon., 68 Comp. Gen. 559, supra.

We have reviewed the certified bill from counsel and find that the Navy's general observations about the allegedly excessive number of hours spent by Omni's counsel in pursuing the protest provide an insufficient basis for rejecting the protester's claim. Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400, supra. With regard to specific matters raised by the agency, or disclosed by our own review, however, we disallow certain portions of the claim for attorneys' fees.

Specifically, we disallow a total of \$600 as follows as unrelated to the pursuit of Omni's protest: \$262.50 for 1.75 hours of attorney's time on November 16, 1988, which in part was spent drafting correspondence relating to an unidentified "companion protest," of which this Office has no record; \$75.00 for .50 hours of attorney's time on March 13, 1989, which in part was spent conferring about "certification procedures for attorneys' fees," presumably in pursuit of Omni's claim for bid protest costs; \$187.50 for 1.25 hours of attorney's time on March 24, 1989, which in part was spent preparing a "bid costs letter," presumably in pursuit of Omni's claim for its bid protest costs; and, \$75.00 for .50 hours of attorney's time on April 4, 1989, which was spent working on a letter to a congressional representative.

As indicated, we have no record of a "companion protest" filed with this Office. Moreover, expenses for efforts to pursue claims for costs before this Office and expenses for contacting a congressional representative are not allowable

since they are, in our view, unrelated to the pursuit of a protest. See Ultraviolet Purification Sys., Inc.-- Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376. While some of the disallowed billings indicate that a portion of the time charged may have been spent on protest-related work, since they have been billed in an aggregated manner, we are unable to discern what portion of the charges actually constitutes allowable costs and, therefore, we have disallowed the charges in full.

As indicated above, the Navy has also challenged Omni's claim for attorney expenses incurred after our first decision was issued on March 7, 1989. Omni's position is that it is entitled to these expenses because they were necessary to respond to the Navy's request for reconsideration.^{1/} \$1,080 of the claim is for reconsideration costs. It is comprised primarily of charges for telephone conferences with the client. Since no written response to the Navy's motion for reconsideration was ever requested by this Office, and none was ever filed by Omni, we find no basis for allowing these claimed costs. Cf. Pacific Northwest Bell Tel. Co. et al.--Claim for Bid Protest Costs, 67 Comp. Gen. 442 (1988), 88-1 CPD ¶ 527 (allowing costs attendant to a protester's response to an agency motion for reconsideration as necessary to further defend a successful challenge to improper procurement practices).

Thus, we disallow a total of \$1,680 from Omni's claim for attorney expenses.

COMPANY COSTS

Omni seeks \$32,828 for 538 hours of time for three of its corporate officers, a senior analyst, and an administrative assistant at burdened rates, inclusive of General and Administrative (G&A) costs and other overhead, ranging from \$21.31 per hour to \$74.34 per hour. In addition, Omni seeks a 9 percent "profit fee" of \$2,954 on these labor costs. Omni also claims \$598 in direct expenses for telephone charges and the fee of an expert witness. Finally, Omni separately claims \$1,584 for "G&A on expenses," i.e., "G&A" for its telephone and witness bills as well as its \$35,210 attorneys' bill.

^{1/} Omni does not argue that expenses during this period related to the filing of its own request for reconsideration.

The company president has certified that the hours claimed were spent in pursuit of the protest, and has certified the hourly labor rates. In addition, Omni has included a narrative which describes what each person did during the hours claimed in connection with the protest from the date of contract award during various stages of the protest process through February 21, 1989, when the final protest submission was filed.

Again, the Navy generally challenges the number of hours as excessive. The agency also questions how the hourly labor rates were computed and suggests that lack of any fractional hours in the billing of the time spent by company personnel is an improper accounting of time actually spent on the protest. The Navy criticizes the company's practice of charging for each participant's time at various meetings, and asserts that there was a duplication of effort between the company and its attorneys because Omni's description of its labor costs includes a charge for assisting in the preparation of a reply memorandum filed with this Office. Overall, the Navy concludes that Omni's labor description lacks sufficient detail to enable it to distinguish which costs were associated with the issue upon which the protester prevailed. Finally, the Navy asserts that Omni is not entitled to profit on its labor costs and a factor for G&A on its direct expenses as claimed.

As to the agency's generalized conclusions that the total number of hours claimed by Omni is per se excessive, we reiterate that such statements do not relieve the agency of its burden to identify specific hours as excessive and to articulate reasons for their rejection. Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400, supra. Likewise, we find unpersuasive the agency's questioning of burdened hourly labor rates which have been certified by the company's president, and which do not otherwise appear, in our view, to be unreasonable. Id. As to the agency's suggestion that the company's estimates of the time spent by its personnel in pursuit of the protest are unreliable, there is nothing in the record which indicates that the estimates do not reasonably represent the amount of time spent on the protest by the individuals involved. See Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, supra.

Further, we find nothing inherently unreasonable in charging for the time of each participant in meetings they attended which were related to pursuing the protest. There has been no allegation that the meetings did not occur or that they not include the persons described by Omni as attending. As to the Navy's allegation that Omni somehow duplicated the

efforts of its attorneys by assisting in the preparation of a reply memorandum, we see nothing wrong with clients providing nonlegal assistance in the preparation and review of filings and factual exhibits, which Omni states was the case here, and such assistance does not, in our view, compel a conclusion that efforts were needlessly duplicated, as the Navy argues. Moreover, we note that Omni's submissions in this matter involved a rather extensive investigation of ATI's proposed personnel by the protester which resulted in the preparation of numerous exhibits and affidavits. In this regard, it is important to note that the results of the investigation conducted by Omni provided a factual predicate for our conclusion that ATI had misrepresented the availability of its personnel.

With regard to the Navy's overall concern that Omni's labor bill lacks sufficient detail to determine the amount of time spent on the issue on which the firm prevailed, we again note that the protester's entitlement to its costs is not limited in this manner. Omni Analysis et al.--Request for Recon., 68 Comp. Gen. 559, supra.

We do, however, agree with the Navy's position that Omni is not entitled to a "profit fee" on its labor costs as claimed in the amount of \$2,954. There is no statutory basis for permitting the recovery of profit as part of protest costs and we disallow this portion of the claim. See The Howard Finley Corp., B-226984.2, Nov. 21, 1988, 88-2 CPD ¶ 492.

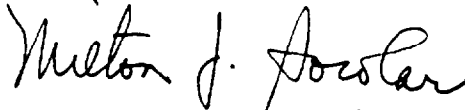
As stated above, Omni has also separately claimed a total of \$1,584 for "G&A" on its direct expenses--expressed as a percentage of its attorneys' bill and its telephone and witness bills. The Navy questions these charges and notes that Omni has not provided a basis for determining what factors are included in its "G&A" calculations as applied to its direct expenses. In response, Omni has stated only that use of the "G&A" rate in this manner is part of its "normal billing practices."

While we have not objected to Omni's claim for "G&A" and other overhead expenses as they comprise part of the protester's certified burdened labor rates, we believe that Omni has failed to explain what the claimed "G&A" as a percentage of its attorneys' bill, phone and witness bills is intended to cover. In the absence such an explanation of this portion of the claim, we are unable to conclude that it accurately reflects costs attendant to pursuing Omni's protest and we, therefore, disallow it. See Locom Corp., GSBGA No. 9101-C (8951-P), 88-3 BCA ¶ 20,902, 1988 BPD ¶ 120.

Thus, we disallow a total of \$4,538 from Omni's claim for company expenses.

CONCLUSION

The total amount disallowed from Omni's claim of \$73,174.40 is \$6,218 (\$1,680 in attorneys' expenses and \$4,538 in company expenses). We, therefore, find that Omni is entitled to reimbursement in the amount of \$66,956.40 for the reasonable costs of filing and pursuing its protest.



Acting Comptroller General
of the United States